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No. 08-31

Supreme Court, U.S.
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In The Supreme Court of the United States

NUFARM AMERICA'S INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF ON PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Opposition Brief states the Question Presented incorrectly in the respect that there was no "failure to waive import duties" as a matter of law or in the facts of record and for the reason that the courts below have never seen or ruled on the issue of whether a "failure to waive import duties" violates the Export Clause. Petitioner submits that the statement of the Question Presented in the Petition correctly describes the constitutional issue before this Court:

> Whether the Export Clause in Article I, Section 9, Clause 5 of the United States Constitution is violated by assessment of duties on goods, pursuant to the North American Free Trade Agreement Article 303, the North American Free Trade Agreement Implementation Act and 19 C.F.R. § 181.53, because those goods have been exported to a NAFTA country after importation into a duty deferral program.

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STATEMENT

Petitioner takes exception to the Opposition Brief's Statement references to a "deferral" or "waiver" of "import duties", e.g. Opp. Br. pp. 2, 3, 4, 5, 6. As discussed in Petitioner's Argument *infra*, there is no basis in fact or law to claim that the duties exacted under 19 C.F.R. § 181.53 are import duties that have been deferred or waived. The goods entered into the United States in this case under an entry for Temporary Importation Under Bond were "exempt" from duty under the Harmonized Tariff Schedule of the United States. Consequently, the goods were not "subject to" import duties that could be "deferred" or "waived."

Similarly, the Opposition Brief incorrectly states that Petitioner "invoked HTSUS 9813.00.05 to defer payment" of duties "[i]nstead of paying those duties immediately." Opp. Br. p. 4. As detailed in Petitioner's Argument *infra*, under the Tariff Schedule and Customs regulations, imports entered under this classification are "exempt" from rather than "subject to" duties at time of import. Accordingly, Petitioner did not "invoke" HTSUS 9813.00.05 to "defer" payment of duties on goods that were "exempt" from duties.

ARGUMENT

Petitioner Nufarm America's, Inc. ("Nufarm") replies to the Opposition Brief of the United States with the following points:

1. The Opposition Briefs argument is based in the main on a mischaracterization of the legal exaction of duties pursuant to 19 C.F.R. § 181.53 ("the Regulation") as a "failure to waive import duties" imposed on imported goods which are "deferred" and which can be ultimately "waived" if the goods are used to manufacture articles that are then exported to another country that will apply its own import duties. Opp. Br. I, 4-5, 6.

The legal provisions under which exaction of the Regulation's duties occurs do not provide for "imposition" of import duty that is "deferred" followed by a "failure to waive the import duties" upon export to a NAFTA country. Stated precisely, the imported goods are "exempt" from duty under the terms of the Harmonized Tariff Schedule of the

United States ("HTSUS") and Customs duty deferral regulations, and thereafter no duties are ever laid on the goods with the single exception of when an "exported good" becomes "subject to duty" under the Regulation upon the goods export to Canada or Mexico. Because neither the imported goods nor the exported goods are "subject to" import duties, it cannot be said that duties laid on the exported goods resulted from a "failure to waive import duties."

HTSUS U.S. General Note 1 provides:

> 1. Tariff Treatment of Imported Goods and of Vessel Equipments, Parts and Repairs. All goods provided for in this schedule and imported into the customs territory of the United States from outside thereof, and all vessel equipment, parts, materials and repairs covered by the provisions of subchapter XVIII to chapter 98 of this schedule, are **subject to duty *or* exempt therefrom** as prescribed in general notes 3 through 29, inclusive.

(Emphases added.) The Customs regulation governing Temporary Importations under Bond ("TIBs"), i.e. the duty deferral program used by Nufarm for the entry of its imports under HTSUS 9813.00.05, refers to

> Entry of articles brought into the United States temporarily and **claimed to be exempt from duty**....

19 C.F.R. § 10.31 (emphasis added).

While the Opposition Brief repeatedly refers to import duties as being "imposed" and then "deferred" under a TIB, as a matter of law there is no provision for the "imposition" and "deferral" of duty on TIB entries in U.S. General Note 1, the TIB classification or the relevant Customs regulation. Instead, at time of importation, goods imported under a TIB are "exempt" from rather than "subject to" duties. It therefore cannot be said that import duties were "imposed" on these goods when entered, then "deferred" until export, and finally laid on the exported goods by virtue of a "failure to waive" the import duties because of export to Canada or Mexico.

As Nufarm's TIB imports were exempt from and not subject to import duties, the only applicable legal authority under which Nufarm's goods could become "subject to" duties is the authority contained in NAFTA Article 303 and the Regulation. If Nufarm's goods had been exported in a timely manner to any non-NAFTA country, no duty is owed on Nufarm's exports or imports because the imported goods exempt from duty under the TIB have met the requirements of the TIB for continued exemption from duties. HTSUS Chapt. 98 Subchapt. XIII U.S. Note 1(a). If Nufarm's goods had not been exported, import duties are not imposed under the HTSUS; instead "liquidated damages" are assessed under Customs regulations for breach of the

conditions of the importers bond in the amount of double the applicable estimated duties. 19 C.F.R. § 10.39(d)(1). When Nufarm's goods are entered under a TIB and are subsequently exported to Canada or Mexico, only then do they become "subject to" duties under authority of the Regulation which mandates that the "exported good shall be subject to duty." 19 C.F.R. § 181.53(a)(2)(i)(A). This treatment is consistent with Article 303 which does not require that import duties are actually applied, but rather that the Party to NAFTA "shall assess customs duties *as if* the exported good had been withdrawn for domestic consumption." NAFTA Art. 303(3), I.L.M. at 300; emphasis added.

In sum, the Opposition Brief is wholly inaccurate when it states that Nufarm paid "import duties related entirely to petitioner's importation of chemicals." Opp. Br. p. 10 The imported goods were "exempt" from duty and were never subject to any import duty that was deferred or subsequently laid on exported goods through a "failure to waive import duty." Duty was laid on the exported goods only under authority of the Regulation upon the condition of exportation out of a duty deferral program to Canada or Mexico. *See also* Brief of Amicus Curiae Transbas Inc., p.9 footnote 7.

2. The Opposition Brief's choice of the new nomenclature "failure to waive import duties" to characterize the exaction of duties under the Regulation does not overcome the fact that the Regulation's requirement to pay duties was mandated for the express function of restricting export trade of goods imported into a duty deferral

program for export and then subsequently exported to Canada or Mexico. Thus, the duties that purportedly result from a "failure to waive import duties" nevertheless burden intentionally and specifically goods exported from the United States.

It should be noted that the Opposition Brief does not specifically defend or rely on the holdings of the courts below that the duties at issue are constitutional because they are "imposed" upon importation and merely "assessed" under the Regulation upon the export of the merchandise. Indeed, the Government appears to desert this distinction when it refers in the first sentence of its argument to the Regulation which "imposes a duty upon imported goods." Opp. Br. 6.

Instead, the Government claims, for the first time in eight years of argument in administrative and judicial proceedings, that the duties paid by Nufarm are constitutional because they are the result of a "failure to waive" import duties. Instead of defending the affirmative act of "assessment" of duties on exported goods under the Regulation, the Government now seeks to rely on a distinction as to duties laid on exported goods by way of an omission through "failure to waive import duties."

Whether exaction of duties occurs by imposition, assessment, levy or any other affirmative laying of a duty upon goods, or by "failure to waive" or any other omission, the test in this Court's holdings on the Export Clause is still the same, that is whether a tax or duty has been laid on exported goods directly or indirectly in a manner that

operates or functions as a burden on exports. *United States v. International Business Machine Corp.*, 517 U.S. 843 (1996) ("*IBM*").

The Opposition Brief's argument that the Regulation's duties do not violate the Export Clause because they result from a "failure to waive import duties" ignores the holding of the Court that a tax or duty violates the Export Clause, even though not placed on the exports themselves, where such a charge is "functionally the same." *IBM*, 517 U.S. at 846. Similarly, the Court in *United States v. United States Shoe*, 523 U.S. 360, 367 (1998) ("*U.S. Shoe*") ruled that a charge which, regardless of its name, effectively operates as a tax or duty on exported goods violates the Export Clause. The Court observed that the "crucial question" is whether the charge is a duty on exports "in operation as well as nomenclature." *U.S. Shoe*, 523 U.S. at 367.

A "failure to waive import duties" that indirectly burdens an export is no less violative of the Export Clause than a duty on premiums for export shipment insurance which indirectly operate as a burden on exports. *IBM* at 854-55. Whether by affirmative act or omission, whether direct or indirect, a tax or duty violates the Export Clause where the effective result of its exaction is a burden on exports, a burden on services or activities closely related to the export process, the regulation of export trade or the raising of revenue from export trade. *IBM* at 854-56, 859.

In the long line of cases that establish the uniquely broad construction and application of the

Export Clause, there is no authority that remotely suggests the Export Clause should not apply to duties that burden exported goods simply because those duties arise indirectly through a "failure to waive" deferred import duties as a result of the export of those goods. An indirect burden through the purported "failure to waive" duties directed to certain goods because of their export operates and is functionally the same as a tax or duty laid on exported goods through direct imposition or assessment and should be prohibited under the broadly interpreted Export Clause.

3. The Opposition Brief's argument that the duties paid by Nufarm under the Regulation are exempt from the Export Clause under *Cornell v. Coyne*, 192 U.S. 418 (1904) as "prior ordinary burdens of taxation which rest upon all property similarly situated" (Opp. Br. p. 7-8) is contradicted by the fact that the payment of duties is mandated under the Regulation specifically, expressly and solely to the limited situation in which goods entered into a duty deferral program are exported out of the duty deferral program for export to Canada or Mexico.

Exaction of duty under the Regulation is not a remote general tax on all imported goods that incidentally falls on exports. The taxation in this case did not occur as a general tax on all similarly situated goods simply because they were imported, nor was the tax generally laid on all manufacture of goods in a duty deferral program. Those predicates did not result in the payment of duty by Nufarm. The limited situation that was the predicate to the

Regulation's application of duties in this matter was the entry of goods into a duty deferral program and their subsequent export specifically to Canada or Mexico. The Regulation's exaction of duties on exported goods was not incidental; it was expressly intended.

Thus, the Regulation's duties are not a "prior ordinary burden of taxation which rests upon all property similarly situated." It is a tax laid in a limited and discriminatory manner to burden specific exports solely because they involved entries into a duty deferral program and subsequent export to two specified countries. Rather than being exempt from the Export Clause, this tax is in clear violation of its proscription.

4. The Opposition Brief argues that under *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923) ("*Spalding*") the duty paid by Nufarm pursuant to the Regulation is exempt from the Export Clause because it is a tax only on the process of manufacturing goods for export and not on goods in the course of exportation. This argument is not supported by the holding of that case or the facts of record in this case.

Spalding held that even a tax imposed under a general law "not aimed specially at exports" violated the Export Clause when it was laid on a transaction that "from start to finish was understood and intended by the plaintiff...to be for the purpose of exporting the goods...The question is whether the [taxed event] was a step in exportation...." 262 U.S. at 68-69. The duty paid by Nufarm under the

Regulation's requirements was not exacted because the goods were imported or because manufacturing occurred. Duty payment was mandated under the Regulation ultimately because of the fact that these imported goods were entered under a TIB for manufacture and mandatory export, and then were subsequently exported to Canada or Mexico.

5. With respect to Nufarm's argument that the Regulation's duties are an impermissible tax on "services and activities closely related to the export process," the Opposition Brief first responds by mischaracterizing Nufarm's payment of duties under the Regulation as the "collection of import duties on its imported chemical." Opp. Br. p. 12. What the Opposition Brief fails to note is that Nufarm did not pay any "import duties" on its imported chemicals under the requirement of the Tariff Schedule, but rather by virtue of the authority of NAFTA Article 303 and the Regulation. The Regulation, moreover, did not require Nufarm to pay import duties on its imported chemicals. The Regulation required that "the exported goods shall be subject to duty" after their export out of a duty deferral program to Canada or Mexico, and that the duty to which the exported good shall be subject is "assessed" on the basis of the "condition" of the imported good, i.e. its condition, weight and value, "at the time of its importation."

There is an obvious problem with the Opposition Brief's conclusion that "the ultimate assessment and collection of the deferred duty cannot plausibly be described as imposing 'effectively a tax'" on Nufarm's use of a deferral program as a

service and activities closely related to the export process. When Congress required the application of duties under NAFTA Article 303 and the enabled Regulation, it did so with the express intent to "restrict" the use of duty deferral programs for exporting goods to other NAFTA countries. It is entirely accurate to describe the Regulation's duties as a tax to limit the use of duty deferral programs for exporting goods to Canada or Mexico because that is expressly what Congress intended.

While Congress has power under Article I of the Constitution to regulate foreign commerce, the broadly interpreted Export Clause strictly prohibits Congress from exercising that power to regulate through laying taxes or duties on exported goods or on "services and activities closely related to the export process."

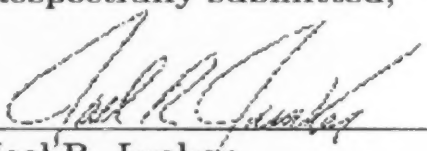
Finally, the Opposition Brief contradicts itself when it argues on the one hand that the duties are a tax on the process of manufacturing for export in a duty deferral program, rather than a duty laid on goods in the export process (Opp. Br. p. 9), and then argues that the duties are not a tax on the use of duty deferral programs for manufacture for purposes of export. If the Government asserts that the Regulation's duties are a tax on manufacture because it occurs under a duty deferral program for mandatory export of the manufactured goods, then it is a tax on services and activities closely related to the export process. In the end, Congress and the Regulation intend that exported goods are subject to a duty laid on goods to restrict their being entered into a duty deferral program and then subsequently

exported to Canada or Mexico. It is a duty which by its operation is functionally laid upon and burdens both exports and the use of duty deferral programs created as a service and activity for facilitation of export trade.

CONCLUSION

Based on the foregoing argument and the absence of any argument in the Opposition Brief that the issues raised are not of significant economic and public importance, Petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,



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